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No. 83-1632

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

HARPER & ROW PUBLISHERS, INC. and
THE READER'S DIGEST ASSOCIATION, INC.,

Petitioners,

vs.

NATION ENTERPRISES and THE NATION
ASSOCIATES, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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THE PARTIES

The Parties before this Court are those set forth in the caption.*

* Pursuant to Rule 28.1 of the Rules of the Supreme Court: Petitioner Harper & Row, Publishers, Inc. states that it has no corporate parent and that other than Fitzhenry & Whiteside Ltd., a Canadian corporation, it has no subsidiaries or affiliates (other than wholly-owned subsidiaries). Petitioner The Reader's Digest Association, Inc. states that it has no corporate parent and no publicly owned subsidiaries or affiliates.

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REPLY BRIEF FOR THE PETITIONERS

ARGUMENT

I

The *Nation* Has Not Attempted To Defend the Novel Legal Standards Applied by The Majority In the Court Below in Determining Copyrightability

(1) Limiting Expression to its Barest Elements

The *Nation*'s brief discusses at length the distinction between fact and expression, but does not attempt to defend the standard which the majority applied in making that distinction - limiting expression to its "barest elements - the ordering and choice of the words themselves." (A-19). The holding is not even mentioned in the *Nation's* brief.

The majority's narrow definition of expression cannot be explained away as *dicta*, as Gannett tries to do in its *amicus* brief. (Gannett Br. at 17-18 n.27). Limiting expression to its "barest elements" is one of the legal principles relied on by the majority to deny copyright protection to much of the material copied by the *Nation*. Moreover, the majority applied this standard in the face of the correct articulation of the law by the dissent:

> ...while a second author may feel free to use facts that are in the first work, he cannot appropriate expression, method of treatment, emphasis, selection of exact details, or anything else that makes the copyrighted work original.

(A-42).

The *Nation* apparently contends that the majority gave adequate recognition to elements of authorship beyond the "ordering and choice of the words themselves" because the majority recognized as protectible, an author's "overall arrangement of facts," the "structure he chooses for the work as a whole" and the unique and protected mosaic of "the total entity". (*Nation* Br. at 18). But this recognition was limited to the work as a whole. It had nothing to do with this case, because Petitioners

never contended that the *Nation*'s copying infringed the mosaic of the "total entity." The recognition did not extend to the portions of the manuscript copied by the *Nation*.

The *Nation*'s reliance on statements by the majority that the *Nation* took only "disparate facts" and "scattered pieces of information" is also misplaced. (*Nation* Br. at 18-19). These characterizations simply reflect the erroneous legal standards applied by the majority. They in no way fit the facts of this case. President Ford's story of the pardon, which makes up the bulk of the *Nation* article, is not just "disparate facts" and "scattered pieces of information." It is a coherent story, as told by President Ford, and repeated by the *Nation*, including President Ford's own expression of the various factors considered by him in granting the pardon and the steps taken and difficulties encountered in carrying out the decision. (E 6-29).

The *Nation*'s own testimony reinforces the conclusion that the *Nation* did not merely take "scattered pieces of information." Mr. Navasky urged throughout the trial that President Ford's version of the discussions with Haig had a different emphasis than the Hungate version (Navasky, TR, JA 348-350, 375-83, 452-53) and that the main thing in the new version was "the configuration of information, rather than this or that." (Navasky, Dep., R. Vol.IV, E 924-25). Mr. Halberstam's testimony, emphasizing the importance of the material as President Ford's "final summing up" after leaving office, also contradicts the *Nation*'s presentation of the material as "disparate facts." (JA 251-252).

The District Court's conclusion that the *Nation* took President Ford's expression is also fully supported by Mr. Navasky's trial testimony that that indeed is what he sought to and did do. (Main Br. at 10).

(2) Denying Copyrightability to Expression Incorporating Facts

Neither the *Nation* nor the *amici* discuss the decisions which reject a dissection approach to determining copyrightability. (Main Brief at 19-21). Yet it is just such an approach which the *Nation* urged in its "sentence-by-sentence" analysis (JA 557-625), and which the majority adopted.

Nor do the opposition briefs cite any authority rejecting the District Court's approach of looking at the copied material as a whole in determining copyrightability. The *Nation* and Gannett argue only that following this approach will give an author a monopoly over facts *per se*. (*Nation* Br. at 22; Gannett Br. at 12-13). The opinion by the District Court, however, cannot be so read.

First, the District Court recognized the validity of the very principle that the *Nation* and Gannett claim is violated. The District Court stated:

> Without question, defendants are correct in their assertion that the historical facts and the memoranda prepared by others are not *per se* copyrightable by President Ford.

(B 10).

Furthermore, the District Court's factual findings make clear that its decision will not extend protection to facts *per se*.

> ...these facts and memoranda were of interest to The Nation only to the extent that The Nation could set forth Ford's views about them or the manner in which Ford said his life had been affected by them. The Nation certainly had no interest in presenting these historical facts and memoranda in isolation. Rather, it is the totality of these facts and memoranda collected together with Ford's reflections that made them of value to The Nation.
>
> * * *
>
> ...Suffice it to say that, simply viewed, I regard the historical facts, memoranda and statements as integral and necessary components of the context of Ford's revelations as to his state of mind while involved in governmental affairs of the highest consequence.[1]

(B 10-11).

(3) Allowing Virtually Unlimited Paraphrasing From a Work of Non-Fiction

The *Nation* and the *amici* also fail to defend the majority's erroneous belief that the cases which equate paraphrasing with copying concerned instances in which "an alleged infringer borrowed virtually an entire work." (A 17). Yet this is the governing legal principle which the majority cited in rejecting any consideration of the *Nation*'s paraphrasing. The cases cited in our main brief (at 21-22) demonstrate that the majority's standard is unprecedented and incorrect.[2]

---

[1] The *Nation* disputes our assertion that these are "findings" which are "unchallenged." (*Nation* Br. at 22 n. 16). That they are "findings" is apparent from the language itself. That they are unchallenged is clear from the *Nation's* Second Circuit brief, which stated, "...the case involved few disputed factual issues *and none relevant to this appeal.*" (Brief of Defendants-Appellants-Cross-Appellees, at 2 n. 3) (emphasis supplied).

[2] In attempting to distinguish these cases, Gannett, like the *Nation*, misstates their findings. The court in *W.H. Anderson Co. v. Baldwin Law Pub. Co.*, 27 F.2d 82 (6th Cir. 1928) did not rest its decision on a finding that the defendant had used virtually all of plaintiff's selection of facts (Gannett Br. at 20-21 n. 33), but rather found that the defendant's outright copying and paraphrasing in the 54 instances specifically alleged by the plaintiff was sufficient to conclude the question of infringement in the plaintiff's favor. *Id.* at 87-88. Nor is there any basis for Gannett's assertion that the court in *Henry Holt & Co. v. Liggett & Myers Tobacco Co.*, 23 F. Supp. 302 (E.D. Pa. 1938), was influenced by the fact that the defendant presented the three sentences which it copied from the plaintiff's work as a direct quote. To the contrary, the court held that "[t]he reproduction need not be literal and exact; it is a piracy if it appears the copyrighted work has been copied, although altered or paraphrased." 23 F. Supp. at 304 (citations omitted). Similarly, in *Wagner v. Meccano, Ltd.*, 234 F. 912 (S.D. Ohio 1916), *aff'd*, 246 F. 603 (6th Cir.

The *Nation* is incorrect when it states that paraphrasing has never been sufficient for infringement in a case such as this. (*Nation* Br. at 20). In *Holdredge v. Knight Publishing Corp.*, 214 F. Supp. 921 (S.D. Cal. 1963), the court found infringement in defendant's magazine article, which was in large part a paraphrase of portions of the plaintiff's book, the court stating: "...to constitute an infringement of copyright, the infringing composition need not be identical with the infringed; paraphrasing is an infringement." (*Id.* at 924).

The *Nation* also errs when it argues that "paraphrase" means "use of fact." (*Nation* Br. at 19). An examination of Appendix E to the Petition for Certiorari demonstrates that in numerous instances the *Nation*'s paraphrasing involved taking the identical words or phrasing used by President Ford.

Applying the traditional rule on paraphrasing will not, as the *Nation* contends, preclude reporting on President Ford's discussion of his decision to pardon Nixon (*Nation* Br. at 20). It will only ensure that any such "reporting" that takes substantial copyrighted material will be judged by the standards of fair use.[3]

Footnote Continued

1917) the court did not base its finding of infringement on the "virtually verbatim taking of material, contiguous portions of plaintiff's pictorial and oral expression." (Gannett Br. at 21). Rather, it found that the defendant had infringed the plaintiff's instruction manual for its mechanical toys by "...paraphrasing the language of some of [plaintiff's] statements and descriptions in its Manuals so as to describe the same thing in somewhat different language." 234 F. at 922. Gannett's reliance on *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F. 2d 485 (9th Cir. 1984) is likewise misplaced, because that case did not involve "close paraphrasing" or copying of plaintiff's "selection, coordination and arrangement" of the material. *Id.* at 488-489. Further the instructional material involved in *Landsberg*, unlike the material here, was capable of only a "narrow range of expression". *Id.* at 488.

[3] Gannett's argument that statements attributed to others are not copyrightable by Ford (Gannett Br. at 16 n. 25) is directly inconsistent with Nimmer's treatise, where he argues that the statements in question must have been reconstructions, and as such were copyrightable. (1 M. Nimmer, *Nimmer on Copyright*, § 2.11[B] at 2-161 n.11 (1984)). "[A] very slight degree of original contribution to form will suffice, as where an 'author' reconstructs an actual conversation rather than using a verbatim stenogrphic report." *Id.* at 2-160.

II

The *Nation* Has Not Acknowledged That The Right They Are Seeking to Vindicate Is the Right to Scoop an Author on the Author's Own Copyrighted Material

The *Nation* has not attempted to demonstrate how the policy of facilitating the dissemination of information applies to this case, where the author himself was about to disseminate the material. Nor has the *Nation* sought to show any benefit to the public from its unauthorized release of the material only days ahead of its lawful release by the author.

The *Nation* has not acknowledged that what it did here - to use its own words - was "to scoop President Ford on his own memoirs," (R. Vol.IV, PTX 22, E 782) and that that is the "right" the *Nation* seeks to vindicate.

By ignoring what actually happened, the *Nation* and Gannett cite principles that have no application here. Thus the *Nation* (at 32) relies on a statement in *Hoehling v. Universal City Studios*, 618 F.2d 972, 980 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980) that knowledge is expanded "by granting new authors of historical works a relatively free hand to build upon the work of their predecessors", and Gannett cites the classic statement by Professor Chaffee that a "dwarf standing on the shoulders of a giant can see farther than the giant himself." (Gannett Br. at 10). But this policy has no application when the second "author" is really engaged in a race to publish first, and, far from building upon, in fact has added nothing at all to the first author's work.

The *Nation* characterizes petitioners as "book publishers who sell news [and] would prefer to be the first to do so." (*Nation* Br. at 28). Rather, petitioners are asserting a right derived from the author, and expressly recognized in the Copyright Act, to be the first publisher of the author's copyrighted material.

The characterization is not apt for a second reason. President Ford testified that while in office he had disclosed all of

the facts about the pardon and that in the book he expressed in addition, "my subjective feelings, my personal discussions with my wife and others" and "the more intimate, the more personal, the more subjective personal feelings that went through my mind from the time that the pardon became a possibility." (JA 492-97; Finding 23, C 16-17). Petitioners also understood that the material not previously disseminated would relate to Ford's descriptions of his personal thoughts and feelings about the events of his Presidency, rather than the events themselves. (Finding 24, C 17).

The *Nation*'s criticism of President Ford for failure to disseminate, prior to first publication, copyrighted material it took him two years to write overlooks the fact that it was the very process of writing the book that brought forth these insights. The *Nation* quotes Ford's deposition testimony concerning a statement in the manuscript, concededly expression (JA 609), that "Had I said otherwise at that moment the whole house of cards might have collapsed." (*Nation* Br. at 4). Ending its quotation with the testimony that this observation was not published prior to book publication, the *Nation* omits the following questions and answers:

Examination By Mr. Abrams:

* * *

Q Would it have been useful, do you think, for individuals passing judgment on your performance as president to have had the information that you provided in your book with respect to the pardon?

A You mean from the date of the pardon up until the time the book was written?

Q Yes, sir.

A I think it was important to them to have what I wrote in the book, based on my thoughtful preparation in the book, yes.

Q Would it have been important for them to have had it earlier.

A Not necessarily my subjective feelings, no. They had on the record the factual presentation, but the subjective feelings I had in the period of time I think could best be made available for history by the writing of the book.

(JA 524, 531-32).

The portions omitted by the *Nation* emphasize the important role that authorship plays in facilitating the dissemination of material to the public, a role which the majority and the *Nation* virtually ignore.

III

Congress Clearly Intended That The Fair Use Defense Would Be Narrowed When the Work Was Unpublished

In passing the Copyright Act of 1976, Congress clearly intended that the fair use defense would be narrowed when the work was unpublished. To avoid this obvious and dispositive conclusion, the *Nation* and Gannett are forced to distort the legislative history.

Both the *Nation* and Gannett place great reliance on the fact that the language of the 1975 Senate Report - that the applicability of the fair use doctrice to unpublished works is narrowly limited - was not repeated in the 1976 House Report. (*Nation* Br. at 34-35; Gannett Br. at 25). Indeed Gannett argues that the failure to repeat the language implies a contrary intent on the part of the House. (Gannett Br. at 25 n. 46).

In fact, however, the House did not reject this concept, but actually *endorsed* it. On two prior occasions, 1966 and 1967, the House had included in its report on the Copyright Act, the very langugage contained in the Senate's 1975 report. (H.R. Rep. No. 2237, 89th Cong., 2d Sess. 63 (1966); H.R. Rep. No. 83, 90th Cong., 1st Sess. 34 (1967)). Between the issuance of the 1975

Senate Report and the 1976 House Report, the interested parties (authors, publishers and educators) met and agreed on a set of guidelines for classroom copying. Those guidelines were incorporated in the 1976 House report and approved. (H.R. Rep. No. 1476, 94th Cong., 2d Sess. 67-72 (1976)). It was for this reason that the earlier discussion was not included. Nonetheless the House went out of its way to endorse that earlier discussion, stating:

> In 1967 the Committee also sought to approach this problem by including, in its report a very thorough discussion of "the considerations lying behind the four criteria listed in the amended section 107, in the context of typical classroom situations arising today." This discussion appeared on pp. 32-35 of the 1967 report, and with some change has been retained in the Senate Report on S. 22 (S. Rep. No. 94-473, pp. 63-65). *The Committee has reviewed this discussion, and considers that it still has value as an analysis of various aspects of the problem.*

(*Id.* at 67) (emphasis supplied).

The Committee was clearly referring to its discussion of the use of unpublished manuscripts, since that was one of the aspects of the problem which the prior report had thoroughly analyzed. Moreover, as the 1976 House Report observed, the standards discussed in the report were not limited to classroom teaching, but were applicable to all kinds of uses:

> The concentrated attention given the fair use provision in the context of classroom teaching activities should not obscure its application in other areas. It must be emphasized again that the same general standards of fair use are applicable to all kinds of uses of copyrighted material, although the relative weight to be given them will differ from case to case.

(*Id.* at 72).

Since the House in fact approved the prior discussion, the *Nation*'s speculation as to the reasons for rejecting it are wide of the mark. (*Nation* Br. at 34-35 n. 25). They are also distorted. For example, the quote from the American Historical Association ("we would see no reason why the general criteria set forth in Section 107 should not apply to unpublished as well as published materials") (*Id.* at 35 n. 25) omits the introductory phrase "in this area." In fact the Association was addressing written "memorabilia whose authors are no longer alive." Moreover, the Association specifically refrained from criticizing the idea that fair use should have narrow application to unpublished works "intended for publication." *Copyright Law Revision: Hearings on S. 597 Before Subcomm. on Patents, Trademarks and Copyrights of Senate Comm. on Judiciary*, 90th Cong., 1st Sess. 641-42, 645 (1967).

Similarly the quote from Mr. Olsson ("I think the doctrine of fair use flatly applies to common law works") (*Nation* Br. at 34 n. 25), in colloquy occurring in 1963, omits the fact that the colloquy concerned works such as plays that were disseminated to the public, but technically unpublished, and omits Mr. Olsson's subsequent assertion that he was not referring to a case where material had been given to another in confidence.* In any event the House adopted the language recognizing the narrow application of fair use to unpublished works in 1966, after the statement of Mr. Olsson.

The Committee report itself disproves Gannett's contention that fair use is narrowed only in a case where the plaintiff has made the deliberate choice that the work is unpublished and *is to remain unpublished* . (Gannett Br. at 25-26). After referring to the author's deliberate choice, the report goes on to state that under ordinary circumstances, an author's "right of first publication" would prevail. Obviously the report would not have referred to the "author's right of first publication" had it intended the

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*Here the District Court found that "Plaintiffs undertook to keep the manuscript confidential" and that "Plaintiff Harper & Row's subsidiary rights department required all those to whom the manuscript was shown to sign an agreement to keep the manuscript confidential." (Finding 30, C 19-20).

limitation suggested by Gannett.[5]

The *Nation* argues the plain language of the statute overrides the clear statement of legislative intent and that adverse inferences should be drawn from Congress' failure to make a specific distinction between published and unpublished works in the fair use provision.[6] But Congress decreed that the fair use doctrine calls for "a sensitive balancing of interests." *Sony Corp. of America v. Universal City Studios, Inc.*, 104 S. Ct. 774, 795 n.40, *reh'g denied*, 104 S. Ct. 1619 (1984). Any such balancing requires the conclusion that there is a vast difference between using material already published and taking material from a manuscript not yet published, particularly when the manuscript is received from a source who has breached a promise to keep it confidential. As we have demonstated (Main Br. at 26-29), the policy of

[5] Gannett makes a similar error when it asserts that the quotation from the English case of *Millar v. Taylor*, 4 Burr. 2303, 98 Eng. Rep. 201 (K.B. 1769) refers to the concept of total confidentiality and lack of intent to publish. (Gannett Br. at 26 n. 49). The very next sentence from the opinion of Mr. Justice Yates disproves the contention: "And as every author or proprietor of a manuscript has a right to determine whether he will publish it or not, he has a right to the first publication; and whoever deprives him of that priority is guilty of a manifest wrong..." (4 Burr. at 2379).

[6] The *Nation*'s reliance on a written submission by William Barns, Associate Professor of History of the University of West Virginia, is misplaced. (*Nation* Br. at 33-34). Professor Barns' proposal related to his concern to provide "effective protection of unpublished theses and dissertations" because some librarians might interpret the fair use provision "as authority for illegal reproduction of manuscripts in their possession." *Copyright Law Revision: Hearings on H.R. 4347, 5680, 6831 and 6835 before Subcomm. No. 3 of House Comm. on Judiciary*, 89th Cong., 1st Sess. 1887 (1965). The fair use provision then in the bill simply stated that fair use was not an infringement. (H.R. Rep. No. 2237, 89th Cong., 2d Sess. 58-66 (1966)). Subsequent to the Barns submission, Congress specifically addressed the problem of library photocopying (17 U.S.C. Section 108 (1982)) and incorporated in its Committee reports the language on which we rely making clear that the applicability of the fair use doctrine to unpublished works is narrowly limited.

disseminating information is not advanced, but is in fact positively disserved by allowing unauthorized copying from a manuscript about to be published. Furthermore use of material from an unpublished manuscript has a much greater potential for harm to the copyright owner than does the use of material from an already published book. As the court noted in the recent case, *Belushi v. Woodward*, 10 Media L.Rep. (BNA) 1870 (D.D.C. 1984), the successful marketing of a book depends upon "the coordination of advertising, serialization, author appearances, and reviews, and the release to the public of the book." *Id.* at 1871. (*See also Goodis v. United Artists Television, Inc.*, 425 F2d 397, 403 (2d Cir. 1970)). The *Nation*'s publication interfered directly with that coordination by disrupting the publishers' plans for serialization. Thus the sensitive balancing of interests mandated by Congress would call for rejection of the fair use defense in this case, even if Congress had not made clear its intent in the committee reports we have cited.

The *Nation* argues that because Congress cited news reporting as a permissible fair use purpose, it could not have intended to limit the use of unpublished manuscripts. (*Nation* Br. at 34). But Congress also specified "teaching" as a permissible fair use purpose and at the same time made clear its intent that this did not include, except in extraordinary circumstances, the right to use an unpublished manuscript.

The *Nation* and Gannett also distort the common law rule relating to the use of unpublished manuscripts. Gannett argues that *Stanley v. Columbia Broadcasting System, Inc.* 35 Cal.2d 652, 661, 221 P.2d 73, 77-78 (Cal. 1950) (en banc) is not relevant because it was decided at a time when California operated under a statute which was more restrictive than common law or statutory copyright. (Gannett Br. at 24 n. 42). But the language of the Supreme Court of California, including its reference to the common law and its reliance on *Corpus Juris*, makes clear that its statements are not based upon some specially restrictive provisions of California law. The court stated:

> Speaking generally ...common-law rights in unpublished works are of a wider and more exclusive nature than the rights conferred by statutory copyright in published works. The common law prohibits any kind of unauthorized interference with, or use of an unpublished work on the ground of an exclusive property right * * * while a statutory copyright permits a "fair use" of the copyright publication, without deeming it an infringement. * * * 18 C.J.S., Copyright and Literary Property, § 2, page 138, et seq.; and cases there cited.[7]

(*Id.* at 77-78).

In addition, both the *Nation* and Gannett incorrectly cite *Hemingway v. Random House, Inc.*, 53 Misc.2d 462, 279 N.Y.S.2d 51 (Sup. Ct. 1967), *aff'd* 285 N.Y.S.2d 568 (App. Div. 1967), *aff'd on other grounds*, 23 N.Y.2d 341, 296 N.Y.S.2d 771 (1968) as a holding allowing fair use of unpublished works. (*Nation* Br. at 36; Gannett Br. at 24 n. 43). That case's discussion of fair use occurs in a portion of the opinion dealing with items relied on by the plaintiff that had "no relevance to a claim resting on common-law rights." 279 N.Y.S.2d at 56. After describing these items, the court stated: "All of these have been generally published, in that they have been distributed to the public at large, without any of the limitations that could preserve the common law copyright." *Ibid.* The court did not mention fair use when dealing with the use of letters and oral conversations.

The authorities cited in our brief (at 30), the AAP brief (at 14-17) and the brief on behalf of Volunteer Lawyers for the Arts (at 3-6) demonstrate clearly that the common law is consistent with the intent of Congress in enacting the Copyright Act.

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[7] In his treatise, Nimmer cites *Stanley*, without qualification, for the proposition that "It has further been judicially stated that the defense of 'fair use' is not available in a common law copyright action." 2 M. Nimmer, *Nimmer on Copyright*, § 8.23 at 8-273 (1984).

IV

Giving Weight to the Non-Productive Nature of the *Nation*'s Use Will Not Require the Court to Evaluate the Worth of the *Nation* Article

The *Nation* distorts Petitioner's argument that the non-productive nature of the use should have been considered by the courts below in this case. As the *Nation* presents it, our view would require a case-by-case determination of the worth of the article. (*Nation* Br. at 28-31). But we are contending only that the *Nation*'s failure to add *anything* to the material it took is a factor to be weighed in the balancing. In such a case, the copier is merely seeking to publish the first author's material for its own sake. Prohibiting such copying does not deprive the public of the copier's speech, because the copier has added nothing to the first author's material. Furthermore, the risk of harm to the copyright owner is greater in the case of a non-productive use, because of the greater likelihood that the use will be a substitute for the author's work or an authorized adaptation of the author's work. That has long been held to be an important factor weighing against a claim of fair use. *Folsom v. Marsh*, 9 F. Cas. 342, 344-45 (C.C.D. Mass. 1841) (No. 4, 901).

Gannett recognizes that the productive use requirement calls for "the contribution of original elements of authorship by the person asserting the fair use of defense." (Gannett Br. at 23). Gannett argues that this use should be considered productive because of the "legitimate paraphrasing" and "selection and arrangement" of materials taken from the manuscript. (Gannett Br. at 23). No doubt some authorship is involved in this. But since Congress has given authors the exclusive right to condense their own works (17 U.S.C. Sections 106(2), 101 (definition of "derivative work") (1982)), it would be a perversion of the statutory purpose to allow an unauthorized condensation to be considered a productive use for fair use purposes.[8]

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[8] With respect to the fourth fair use factor, there is simply no evidence in the record to support the argument that *Time* cancelled the contract with

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The *Nation*'s Expert Testimony, and the "Time Honored Practices of the Media" Relied on by Gannett, Do Not Establish a Fair Use Defense

The "time honored practices of the media" which Gannett relies on for a fair use defense (Gannett Br. at 2-3) are not supported by the record. Gannett argues that news organizations do not customarily add "independent commentary" and that once material is authenticated, it will be published "as soon as possible." (Gannett Br. at 3-4).

Professor Friendly, however, testified that comparing the manuscript with the known record was "the big part of the job of a working journalist" (JA 82). Nor did Professor Friendly confirm the necessity to publish immediately.

> ...it is my job to get the information out as best I can, as reliably as I can, with whatever insight and organized curiosity I may have. *I could not let [Time's publication] be a factor.*

Footnote continued

Harper & Row because of the *Nation*'s publication of facts (*Nation* Br. at 40; Gannett Br. at 29). To the contrary, the managing editor of *Time* magazine testified that *Time* was interested in Chapters I and III of the manuscript, the chapters from which the *Nation* copied, because they were the "most interesting and moving parts of the entire manuscript." (Cave, Dep., R. Vol. V, E 1048-49). Gannett also misstates the record when it argues that *Time* initially sought "simply" to move forward the date of its serialization (Gannett Br. at 29). When *Time* learned of the *Nation* article, it advised Harper & Row that there were two orders of business. One related to moving forward the date of serialization. The second "was whether any further payments should be made at all on the contract..." (Glikes, TR, R. Vol. I, A 232-233). Gannett further distorts the record when it cites Harper & Row's refusal to advance serialization, without also citing Harper & Row's belief that advancing serialization would adversely affect the marketing of the book, and the fact that the District Court accepted this testimony. (B 24-26 n. 11).

> Q Would you try to get it out as fast as you could consistent with your publishing or broadcasting schedule?
>
> A Depends what you mean by fast. I would not be reckless. *My criterion would be:* Is it a fair reflection of the book, *is it accurate and have I done as much digging with the known record*, et cetera. *You would not try to get it out in 24 hours, I would not try to beat the competition.* Somebody told me that—I would always assume that if I had it, maybe some other people had it. That wouldn't really enter into my mind, especially if I was publishing a magazine like The Nation. That would not be a factor. *I train myself to get it right, to get it straight, and then publish it.*

(JA 119-20) (emphasis added).

Similarly the record offers no support for Gannett's attempt to treat this case as just one of "innumerable news stories...based on unsolicited documents and information" (Gannett Br. at 4). The *Nation* had made a similar contention in its trial memorandum (JA 329) but its own Mr. Navasky failed to back it up. He testified that it was a rare event to receive a manuscript without the permission of the author or publisher (Navasky, TR, JA 323), and he expressly denied the contention now being made to this Court:

> Q ...Is it your testimony that the manner in which the Ford manuscript arrived, or as you put it, was dropped into your lap, came to you in a fashion indistinguishable from that of most news which arrives unsolicited at a magazine or newspaper?
>
> A No.

(JA 330).

The *Nation* also distorts the testimony of its own experts. It ignores the testimony of Professor Friendly cited above that comparing the manuscript with the known record is "the big part

of the job of a working journalist." It quotes only a portion of Mr. Halberstam's testimony concerning the extent of copying (*Nation* Br. at 39 n. 29), but ignores the testimony that fits precisely the facts of this case.

> I would think that if the New York Times wrote a story based on [a portion of Halberstam's *The Best and the Brightest]*, that they would have the right to quote from up to three or 400 words directly from my manuscript, yes. It may be as they began to go above that they would be beginning to infringe upon my book. But again it's a gray area...If they had run 600 words of my portrait of Robert McNamara, with the anecdotes and the writing that was mine, then I would have really felt raped and I would be angry...

(JA 273).

At bottom, the *Nation*'s view is that the resolution of the issues raised by this case should be the sole province of journalists, for the *Nation* condemns any critical inquiry into a claim of "news reporting" and any weighing of that interest against other interests, even though those other interests are secured, not only by federal statute, but by the Constitution itself. (U.S. Constitution Art. I, Section 8, cl. 8). But, as Professor Friendly correctly acknowledged, the question of fair use is one to be decided by the Court. (Friendly, TR, JA 111). The testimony by Richard Reeves, another of the *Nation*'s experts, illustrates vividly why that should be so:

> THE WITNESS: ...I know that I never heard the word copyright discussed in a newsroom. I mean, we, the people who sit and put together papers, don't spend time talking about things like that.
>
> • • •
>
> THE COURT: ...Let's suppose you come into possession of a manuscript of a book of his that is about to be published....

> • • •
>
> ...Are you saying that if you found something newsworthy in that book you would publish, irrespective of the copyright?
>
> THE WITNESS: I would publish first, and think about it later....
>
> • • •
>
> THE COURT: ...[Y]ou are aware that that probably is a copyrighted document or to be copyrighted prior to publication and therefore there are copyright features about it that do exist. You certainly have that awareness.
>
> THE WITNESS: I'm sure that is true, and I have that awareness at this moment. I have never taken that into account in any judgment that I have made.

(JA 167-71).

CONCLUSION

The judgment of the Court of Appeals should be reversed, and the judgment of the District Court affirmed.

Respectfully submitted,

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